ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Amendment of Part 20 and 24 of the Commission's Rules — Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap	)	WT Docket No. 96-59
Amendment of the Commission's Cellular PCS Cross-Ownership Rule.	)	GN Docket No. 90-314

COMMENTS OF WESTERN WIRELESS CORPORATION

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SUMMARY

Western respectfully urges the Commission to modify its spectrum aggregation limits to allow cellular licensees and investors to acquire broadband PCS licenses in their area of cellular operations, except in those situations where there is a reasonable fear of anticompetitive conduct. The current cellular/PCS cross ownership rules, which have been held arbitrary by the Sixth Circuit in *Cincinnati Bell,* impose restrictions in many situations where the levels of ownership in the cellular or PCS licensee and geographic overlap between the cellular and PCS markets are so minimal that no anticompetitive motive or opportunity could be inferred. Furthermore, the Commission has not been consistent in its treatment of other carriers. Local Exchange Carriers ("LECs"), acknowledged as possible competitors for PCS licensees, are able to acquire in-market PCS licenses without restriction. Western thus urges the Commission to eliminate this inconsistent treatment absent support from statistical data or a valid economic theory, and to incorporate much higher geographic overlap and ownership attribution thresholds in any reconsidered cellular/PCS cross-ownership restriction. Western also advocates that the Commission eliminate any inconsistencies in the different spectrum cap rules currently in effect so that they reflect a coherent approach.

Western also encourages the Commission to examine the restrictions against partitioning in its current rules. Any discussion of cellular/PCS cross-ownership restrictions necessarily depends on the ability of parties to divest offending interests, and the current

rules' limitations to rural telcos in their areas of wireline service are unrealistic in allowing post auction sales.

Western also advocates: changes to rules regarding F block eligibility to allow holders of C block licenses to exclude them from their financials; retention of the most favorable installment method for F block licenses; not extending installment plans or bidding credits to D and E blocks; relaxing the holding period for C and F block licenses; increasing upfront and down payment amounts for the F block and relaxing the ownership disclosure rules and audited financial requirements.

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Western Wireless Corporation ("Western") hereby submits its Comments in response to the proposals set forth in the Commission's *Notice of Proposed Rulemaking* in the captioned proceeding.[1] Western urges the Commission to modify its spectrum aggregation limits to give greater latitude to cellular licensees or their investors to acquire Personal Communications Services ("PCS") licenses in markets overlapping their cellular geographic service areas ("CGSAs") (or PCS licensees to acquire cellular licenses in markets overlapping their PCS service area.) Current rules prevent a cellular carrier (or person or entity with a 20 percent interest in the carrier, even if it is entirely passive) from owning a 30 MHz PCS

[1] *Notice of Proposed Rulemaking (Amendment of Part 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap* (WT Docket No. 96-59); *Amendment of the Commission's Cellular PCS Cross-Ownership Rule* (GN docket No. 90-314)), FCC 96-119 (released March 20, 1996)("*Bidding/Spectrum Cap NPRM*").

market in the event *ten percent or more* of the PCS service area is included in the CGSA.[2] When coupled with the limitations on partitioning of PCS markets set forth in Section 24.714(a) of the Rules,[3] many parties with relevant experience and infrastructure are precluded from entering the PCS arena because of their ownership of cellular interests that have no bearing on their ability or incentive to serve the public as a PCS carrier and thus promote the objectives of Section 309(j) of the Communications Act of 1934, as amended (the "Act").[4]

In addition to its recommendation to the Commission to relax the restrictions on cellular participation in PCS, Western also has several more specific comments on the *Bidding/Spectrum Cap NPRM*, all as set forth below.

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[2]*See* Sections 24.204(c) and 20.6(c) of the Rules, 47 C.F.R. §§ 24.204(c) and 20.6(c), which define "significant overlap" of a PCS service area where at least 10 percent of the population of the PCS licensed area is within the CGSA (and/or, for the purposes of Section 20.6, the specialized mobile radio ("SMR") service area).

[3]Section 24.714(a) of the Rules, 47 C.F.R. § 24.714(a), provides that only a rural telephone company may be granted a broadband PCS license that is geographically partitioned from a separately licensed Major Trading Area ("MTA") or Basic Trading Area ("BTA"), and subsequent subsections provide, among other things, that the partitioned area must be reasonably related to the rural telephone company's wireline service area.

[4]47 U.S.C. § 309(j). These objectives include (i) the development and rapid deployment of new technologies, products and services, (ii) the promotion of economic opportunity and competition and ensuring that new technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, (iii) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use, and (iv) efficient and intensive use of the electromagnetic spectrum.

I. INTRODUCTION

Western, through its subsidiaries, owns and operates high quality cellular systems in 15 western states, with a focus on Rural Service Areas ("RSAs") and small Metropolitan Statistical Areas ("MSAs"). Western currently serves over 70 cellular markets including nearly 6 million pops. Western also participated in the A and B block PCS auction that was concluded in December 1995, and was the high bidder for and purchased A block licenses for six MTAs. In February 1996, Western had completed initial construction and commenced commercial operations of its PCS system in the Honolulu MTA, which thus became the first auction awarded broadband PCS market to begin commercial operations. Western is working to integrate its cellular and PCS markets to the extent technologically feasible to offer low cost, ubiquitous coverage to its subscribers throughout the western United States, thereby promoting competition with existing and future carriers in its markets. Western draws upon its cellular and PCS experience in recommending a reasoned approach to the limitations on the ability of cellular carriers to obtain and retain PCS licenses in areas where there is geographic cellular/PCS overlap.

II. COMMENTS

A. The Sixth Circuit Remanded the Cellular/PCS Cross-Ownership Rule for Reconsideration of Both the Ownership Attribution Threshold and the Cellular/PCS Overlap Standards.

On November 9, 1995, the United States Court of Appeals for the Sixth Circuit rendered its decision in *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752. The Court held that the cellular/PCS cross-ownership restriction set forth in Section 24.204 of the Rules was

arbitrary, stating that the record contained little or no factual support for the rule.[5] The Court used strong language in exhorting the Commission to reexamine the restrictions that it placed on the ability of the holder of an attributable interest in a cellular carrier to obtain a 30 MHz PCS license where there is a ten percent overlap in the cellular and PCS population areas:

> The Cellular eligibility restrictions have a profound impact on businesses in an industry enmeshed in this country's telecommunications culture. The amounts of money at stake reach into the billions of dollars. The continued existence of some wireless communications businesses rests on their ability to bid on Personal Communications Service licenses. . . . Cellular providers foreclosed from obtaining Personal Communications Service licenses may ultimately be left holding the remnants of an obsolete technology. Precisely because the Cellular eligibility restrictions have such a profound effect on the ability of businesses to compete in the twenty-first century

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[5]Specifically, in response to Cincinnati Bell's argument against the cellular attribution standard, the Court stated that the "twenty percent Cellular attribution standard bears no relationship to the ability of an entity with a minority interest in a Cellular licensee to obtain a Personal Communications Service license and then engage in anti-competitive behavior." *Cincinnati Bell*, 69 F.3d at 759. The Court reasoned that there was no record evidence to support the proposition that an entity with a twenty or more percent interest in a cellular provider would not compete with that cellular provider as a PCS licensee. *Id.* at 760. The Court added that "the only rational conclusion--given the high cost of obtaining a Personal Communications license, the strict build-out requirements for licensees, and the existence of at least two other large Personal Communications Service providers in each market--is that a business competing at less than efficient level will soon be driven out of the marketplace." *Id.* In finding the cross-ownership rules arbitrary (Radiofone's argument), the Court stated that "[d]uring these proceedings, the FCC provided little or no support for its assertions that Cellular providers, released from all regulatory shackles and given free reign to roam the wireless communications landscape, might engage in anticompetitive behavior or exert undue market power through, for example, predatory pricing schemes." *Id.* at 762-63. Radiofone had argued that the ownership and overlap [*i.e.*, a ten percent overlap in the cellular and PCS population areas] were not rationally related to the FCC's asserted goal of preventing undue market power, *Id.* at 763, and the Court's rejection of the cellular/PCS cross ownership rules requires that the FCC revisit both the ownership and the overlap standards.

> technology of wireless communications, it was incumbent upon the FCC to provide more than its own broadly stated fears to justify its rules.

Cincinnati Bell, 69 F.3d at 764. Importantly, the Court rejected the cellular eligibility restriction both because the twenty percent attribution standard and the ten percent overlap standard were not supported by the record as reasonable means of avoiding the Commission's asserted fears that cellular providers will detrimentally affect the market if allowed to become PCS licensees.[6] The Court specifically examined both the ownership attribution and overlap benchmarks in its analysis and ultimate rejection of the cross-ownership rule:

> Under the current Cellular eligibility rules, a business which has as little as a twenty percent interest in an existing Cellular provider cannot purchase a Personal Communications Service license if there is a ten percent overlap in the Cellular and Personal Communications Service population area. Radiofone argues that these ownership and overlap benchmarks are not rationally related to the FCC's asserted goal of preventing undue market power.

Id. at 763. Thus, when the Court granted Radiofone's petition and held the cellular cross-ownership rule arbitrary, it remanded the matter to the FCC for reconsideration of both the ownership and the overlap benchmarks.

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[6] *Id.* at 763, 764. Section 24.204(a) of the Rules, 47 C.F.R. § 24.204(a), prohibits a party with an attributable interest in a cellular license from acquiring in excess of 10 MHz of PCS spectrum if the grant of such PCS license will result in "significant overlap" of the PCS licensed service area(s) and the CGSA(s) of the cellular license(s). Section 24.204(c), 47 C.F.R. § 24.204(c), defines significant overlap of a PCS licensed service area and CGSA(s) as occurring when ten or more percent of the population of the PCS service area, as determined by 1990 census figures, is within the CGSA(s). Section 24.204(d), 47 C.F.R. § 24.204(d), provides that ownership interests amounting to twenty percent or more of the equity of a cellular licensee will be attributable, with a higher threshold for small businesses.

1. The Commission Should Adopt a Coherent Approach to Spectrum Aggregation in Accordance with the Principles Set Forth in Cincinnati Bell.

In reexamining the cellular eligibility rules, the Commission should consider the interplay among the three current spectrum cap rules. As set forth in the *Bidding/Spectrum Cap NPRM* at 29-30 para. 66, the broadest limitation on spectrum ownership is the 45 MHz cap on Commercial Mobile Radio Service ("CMRS") uses within broadband PCS, cellular and Specialized Mobile Radio ("SMR").[7] Secondly, all PCS licensees are limited to a total of 40 MHz of spectrum in one geographic area.[8] The third restriction is the 35 MHz cellular/PCS spectrum cap that has specifically been remanded to the FCC. Western urges that the Commission revisit these three rules to assure that they reflect a coherent, consistent regulatory approach.

The different attribution standards in the rules result in inconsistent treatment depending upon which rule is deemed to apply. For example, Section 20.6(d) of the Rules provides that an ownership interest of 20 percent or more of the equity of a broadband PCS, cellular, or SMR licensee shall be attributed for purposes of the CMRS spectrum cap. However, Section 24.204(d)(2)(i) provides that ownership interests of 5 percent or more of the equity of a broadband PCS licensee or applicant will be attributable. Similarly, Section 24.229(c)(2) provides that an ownership interest of 5 percent or more is attributable for

[7]Section 20.6(a), 47 C.F.R. § 20.6(a). Section 20.6(c) includes a definition of "significant overlap" similar to that set forth in Section 24.204(c) (and rejected by the Sixth Circuit in the *Cincinnati Bell* decision), providing that significant overlap occurs when at least 10 percent of the population of the PCS licensed service area is within the CGSA(s) or SMR service area(s).

[8]Section 24.229(c) of the Rules, 47 C.F.R. § 24.229(c).

purposes of the 40 MHz PCS spectrum cap. Thus, the situation could arise where an investor with, for example, a 15 percent interest in a 30 MHz PCS licensee and a 15 percent interest in a cellular licensee in a market with significant overlap with the PCS market would be permitted to retain such interests under Section 20.6 but would be required to divest its interests under Section 24.204—an inconsistent result which clearly serves no legitimate regulatory purpose.[9]

Furthermore, even though the Court in *Cincinnati Bell* stated that it was not striking down the 45 MHz CMRS spectrum cap for procedural reasons,[10] the Commission should take the opportunity in this rulemaking to bring the 45 MHz cap into compliance with the standards set forth in *Cincinnati Bell*. Because the underlying rationales of the 45 MHz cap and the cellular/PCS cross ownership restriction were in large part identical,[11] the Court's rejection of this rationale in the context of the cellular/PCS cap threatens to undermine the validity of the 45 MHz cap, to the extent that rule is at odds with the standards set forth in

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[9]The Commission may want to implement a single spectrum cap rule to eliminate the redundancies in the three existing rules. For example, except for the differences in the attribution thresholds, there appears to be no set of circumstances under which ownership of multiple PCS licenses by a single attributable investor that complies with the requirements set forth in Section 24.229 could also run afoul of the limitations set forth in Section 20.6. Section 24.229 would limit a single attributable investor to one 30 MHz and one 10 MHz PCS license in the same or overlapping markets. Absent spectral partitioning, Section 20.6 would not allow ownership of any additional PCS licenses by the same investor.

[10]*Cincinnati Bell*, 69 F.3d at 765 n.6. The Court indicated that it declined to strike down the 45 MHz cap because the issue was not presented to the Court in Radiofone's initial petition.

[11]The Commission acknowledged, for example, that the 20 percent attribution level for the CMRS cap was "chosen to be consistent with the attribution standard for the PCS/cellular cross-ownership rule." *Bidding/Spectrum Cap NPRM* at 31 para. 70 (cite omitted).

Cincinnati Bell.[12] Therefore, the Commission should reconsider any features of Section 20.6 that have been rejected by the Court in the context of Section 24.204 (*i.e.*, the 20 percent attribution threshold and the 10 percent overlap standard).[13]

2. The Disparate Treatment of Cellular Carriers and Local Exchange Carriers with Respect to Their Eligibility for In-Market PCS Licenses Must Be Corrected.

In revisiting its cellular/PCS cross-ownership restriction, the Commission should consider the disparate treatment afforded local exchange carriers in this regard. The Commission recognized "that PCS is likely to be both a complement and potentially a competitor to local exchange carriers." *Second Report and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services)*, GEN Docket No. 90-314, 8 FCC Rcd. 7700, 7747 para. 112 (1993) (the "*PCS Second R & O*"). It is almost universally accepted that broadband PCS may signal the way to provide competition to the monopoly that is currently enjoyed by local exchange carriers ("LECs") in their local service

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[12]In the *Third Report and Order (Implementation of Section 3(n) and 332 of the Communications Act)*, 9 FCC Rcd. 7988, 8108-10 (1994), the Commission stated that the purpose of the 45 MHz spectrum cap is to prevent cellular carriers from artificially withholding capacity (*i.e.*, acting anticompetitively) and to promote diversity of license ownership. The *Third Report and Order* repeatedly cites to the *Further Notice of Proposed Rule Making (Implementation of Section 3(n) and 332 of the Communications Act)*, 9 FCC Rcd. 2863 (1994), in which the Commission proposed to adopt the 35 MHz cellular/PCS spectrum cap that was vacated by the Sixth Circuit. Thus, the underlying rationale of the 45 MHz spectrum cap and the cellular-PCS cross-ownership rule is virtually the same, and that rationale was rejected as arbitrary by the Sixth Circuit in *Cincinnati Bell*.

[13]The Commission itself has sought comment on whether it should modify the 20 percent attribution standard applicable to the 45 MHz spectrum cap in light of the Sixth Circuit's opinion regarding this type of standard in connection with the cellular/PCS cross-ownership test, *Bidding/Spectrum Cap NPRM* at 32 para. 72, in apparent recognition of the fact that the *Cincinnati Bell* remand may have an impact on Section 20.6, notwithstanding the fact that the Court, on procedural grounds, refused to vacate this rule. (emphasis in original).

areas.[14] Mirroring its discussion of the balance of the benefits of existing experience and infrastructure against the purported threats against competition that might flow from permitting cellular carriers to hold PCS licenses in their own markets (see discussion below), the Commission described the "economies of scope between PCS and the LEC wireline network that could not be realized if LECs were prohibited from providing PCS within their wireline service area." *PCS Second R & O*, 8 FCC Rcd. at 7747 para. 112. It also recognized the concerns that "LECs have the market power and incentive to block development of competitive PCS services." *Id.* at 7751 para. 124. Nonetheless, the Commission concluded that LECs should be given the opportunity to participate in the provision of PCS services without restriction. *Id.* at 7751-52 paras. 126-27. Eliminating (or at least loosening) the cellular/PCS cross-ownership restrictions would be the appropriate means for the Commission to address the inconsistent treatment of LECs, on the one hand, and cellular carriers, on the other hand, with respect to their eligibility to obtain in-market PCS licenses.

The disparate treatment of cellular licensees and LECs is not explained in the orders addressing the issues. In the context of LEC eligibility for in-market cellular licenses, the Commission recognized that the benefits of economies of scope could only be achieved by

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[14]*See* the Remarks of Commissioner Susan Ness, March 25, 1996 before the CTIA's Special Commissioner's Forum, "The End of the Beginning"(or "Hoopla"), Dallas, Texas, at 5, where Commissioner Ness, in her discussion of the monopolies heretofore enjoyed by the fixed local loop and the new era of deregulated competition ushered in by the Telecommunications Act of 1996, stated: "Wireless services will play a pivotal role in enabling consumers to break away from the wireline incumbents which, until now, were selected not because they were necessarily the right choice but because they were the only choice."

allowing LECs to provide PCS service within their wireline service area. *Id.* at 7747 para. 112. However, even though the Commission stated that it recognized "that participation by cellular operators in PCS offers the potential to promote the early development of PCS by taking advantage of cellular providers' expertise, economies of scope between PCS and cellular service, and existing infrastructures, *Id.* at 7744 para. 104, it without further explanation concluded that "the public interest would be served by allowing cellular providers to obtain PCS licenses outside of their cellular service areas." *Id.* (emphasis added). The Commission offered no supporting data or even a general economic theory for the proposition that LECs would require in-market PCS to gain the benefits of economies of scope, while cellular licensees could benefit from their existing expertise, economies of scope and infrastructures with PCS licenses outside their cellular markets.

Indeed, the comments in support of giving LECs an opportunity to participate in PCS within their service areas without restriction apply with equal force to allowing cellular carriers the same opportunity:

> PacTel believes that LEC participation will produce a broader access to and acceptance of PCS. Additionally, a number of parties argue that LECs constitute one of the more qualified and experienced parties ready to provide new PCS services. GTE claims that barring LECs from PCS could lead to large numbers of LEC customers migrating to PCS providers, thus damaging the existing wireline telecommunications infrastructure. . . . Further, GTE believes that if LECs are unable to provide PCS to their customers, many customers will leave and the remaining customers will be forced to absorb non-traffic sensitive costs by paying higher rates for basic service.

Id. at 7749 para. 118. Similarly, in response to petitions for reconsideration of the cellular/PCS cross-eligibility restrictions set forth in the *PCS Second R & O*, the Commission stated:

> we remain convinced that restrictions on in-market cellular providers are necessary to achieve our goal of maximizing the number of new viable and vigorous competitors. In reaching this conclusion we do not assume that in-market cellular providers will engage in illegal anticompetitive behavior. . . . our goal in crafting these rules should not be to prevent anticompetitive behavior which may or may not materialize, but rather, to promote competition. . . . the public interest would be best served by maximizing the number of viable new entrants in a given market.

Memorandum Opinion and Order (Amendment of Commission's Rules to Establish New Personal Communications Services), GEN Docket No. 90-314, 9 FCC Rcd. at 4957, 4998-99 para. 103 (1994) ("*PCS M O & O*") (cites omitted). This logic would apply with equal force in the context of LEC eligibility—allowing a LEC to hold up to 40 MHz of PCS spectrum in its wireline service area clearly could reduce the number of viable new competitors in that market. The Commission must eliminate this inconsistent treatment of cellular carriers and LECs.

The Commission originally had tentatively concluded that 10 MHz of spectrum would be sufficient for the initial deployment of a PCS system integrated with a wireline carrier, mirroring the current limitation on cellular in-market PCS eligibility. *PCS Second R & O*, 8 FCC Rcd. at 7748 para. 115. The Commission lifted this 10 MHz restriction from LECs without any explanation or supporting data for the proposition that 10 MHz of spectrum was insufficient for the deployment of a PCS system integrated with a wireline carrier. *Id.* at 7751-52 paras. 126-27. In the context of cellular carriers, however, the

Commission assumed that 10 MHz of PCS spectrum "will permit local cellular operators to participate in providing PCS if they are successful bidders," *Id.* at 7745 para. 106, again without any reasoned basis.[15] Absent hard data supporting disparate treatment of LEC and cellular eligibility for PCS, the 10 MHz limitation should also be lifted for cellular carriers.

3. Any Reconsidered Restriction Against In-Market Cellular Eligibility for 30 MHz PCS Licenses Should Include (1) a Population Overlap Standard Increased from 10 Percent to At Least 20 Percent, and (2) a Cellular and PCS Attribution Standard Based on *De Facto* and *De Jure* Control.

To the extent that the Commission can support the disparate treatment of cellular carriers and LECs with respect to their eligibility for in-market 30 MHz PCS licenses and retains a cellular eligibility restriction in some form, Western advocates that the Commission (i) raise the threshold for "significant overlap" in the populations of the applicable service areas from 10 to at least 20 percent or higher, and (ii) raise the ownership attribution standard from 20 percent (or actual control) to 50 percent (or actual control). Western believes that a spectrum cap rule based upon these standards would better serve the purposes of Section 309(j) of the Act and is far more likely to withstand any further scrutiny by a reviewing court than the current rule in light of the record as it now exists.

a. The Standard for "Significant" Cellular/PCS Population Overlap Should Be Raised from 10 Percent to At Least 20 Percent.

In adopting the cellular eligibility restrictions, the Commission recognized "that participation by cellular operators in PCS offers the potential to promote the early

[15]This statement is directly contradicted by another statement in the very same order: "Although 10 MHz is sufficient for viable operation of many forms of PCS services, we also believe that some types of PCS operations will require more than 10 MHz to provide services that require wider bandwidths." *PCS Second R & O*, 8 FCC Rcd. at 7726 para. 58.

development of PCS by taking advantage of cellular providers' expertise, economies of scope between PCS and cellular service, and existing infrastructures." *PCS Second R & O*, 8 FCC Rcd. at 7744 para. 104. However, the Commission also expressed its concern "with the potential for unfair competition if cellular operators are allowed to operate PCS systems in areas where they provide cellular service." *Id.* at 7744 para. 105. Accordingly, the Commission reasoned that "where there is significant overlap of a designated PCS service area and a cellular licensee's service area, the cellular licensee will be eligible only for one of the 10 MHz BTA frequency block licenses." *Id.* Without citing to any statistical data or even a general economic theory to support its conclusion, the Commission concluded as follows:

> We will consider significant overlap of PCS and cellular services to occur when 10 or more percent of the population of a PCS service area (MTA or BTA) is within the cellular system's existing coverage area (*i.e.*, the CGSA). We find that an overlap of less than 10 percent of the population is sufficiently small that the potential for exercise of undue market power by the cellular operator is slight.

Id. at 744-45 para. 105.

Western maintains that the 10 percent standard for population overlap is far too low and encourages the Commission to raise this amount to at least 20 percent in order to strike an appropriate balance between the benefits of encouraging participation in PCS by cellular carriers and the desire to avoid any feared potential for unfair competition.[16] It is

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[16]The Sixth Circuit in *Cincinnati Bell* expressed its grave doubts over the legitimacy of the fear that a party with an interest in a cellular provider would have reduced incentive to compete with that cellular provider as a PCS licensee regardless of the degree of market overlap or level of ownership, in view of the cost of the PCS license, the build out (continued...)

important to note that the Commission has itself acknowledged that the "anticompetitive incentives that the [cellular/PCS cross-ownership] rule is designed to combat in the auction process are in principal part generated by the amount of the attributable cellular interest involved, and only secondarily by the degree of overlap."[17] *Third Memorandum Opinion and Order (Amendment of the Commission's Rules to Establish New Personal Communications Services)*, GEN Docket No. 90-314, 9 FCC Rcd. 6908, 6914 para. 33 (1994) ("*PCS Third M O & O*") (emphasis added). Therefore, in reconsidering the spectrum aggregation rule in view of the Sixth Circuit's decision in *Cincinnati Bell*, the Commission should focus in the first instance on the overlap standard as a means for introducing a less restrictive alternative to the current rule while at the same time minimizing any risk that the door will be opened to anticompetitive behavior.

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[16](...continued)
requirements and competitive demands. 69 F.3d at 760. As discussed above, the Commission itself did not give much heed to any fears of anticompetitive incentive or opportunity in allowing unrestricted in-market PCS entry by LECs.

[17]This statement was made in the context of the Commission's modifying Section 24.204(f) of the Rules to permit parties holding non-controlling cellular interests to participate in the PCS auction process without regard to the degree of overlap. In crafting the cellular/PCS cross ownership restrictions, the Commission had initially limited the availability of the "bid but divest" option to entities with an in-market cellular interest that overlaps the population of a PCS service by less than 20 percent, "on the theory that entities with larger overlaps may have incentives to delay the rapid introduction of PCS." *PCS Third M O & O*, 9 FCC Rcd. at 6914, citing *PCS M O & O*. The same logic that compelled the Commission to conclude that the former rule's exclusive emphasis on the degree of overlap was misplaced in the context of divestiture of non-controlling interests should apply with equal force in the context of permitted holdings by parties with controlling interests in PCS and cellular licensees, and compels that the Commission relax the 10 percent overlap standard currently in effect.

A higher population overlap standard has support in several ways. In the first place, the Commission has in many contexts extolled the virtues of ubiquitous coverage and wide-area service.[18] In view of the divergent technologies currently in use or being considered for use in broadband PCS, an effective means of achieving the rapid introduction of wide-area PCS coverage at a low cost is to enable current cellular licensees to dovetail their cellular markets with PCS markets in order to effect a seamless coverage area. Of the eighteen winners of the block A and B PCS licenses, three different technology standards have been selected. These include the Global System for Mobile Communications ("GSM") (which has been selected by Western and is currently in operation in its A block license for the Honolulu MTA); Code Division Multiple Access ("CDMA"); and Time Division Multiple Access ("TDMA"). Currently, no standard is expected to be utilized in at least one of the PCS markets throughout the United States, although the CDMA-based PCS providers PrimeCo and Sprint own licenses covering about 87 percent of the population. Roaming from a PCS market incorporating one standard to one using another standard is not

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[18]*See, e.g., Notice of Proposed Rule Making and Tentative Decision (Amendment of the Commission's Rules to Establish New Personal Communications Services)*, GEN Docket No. 90-314, 7 FCC Rcd. 5676, 5678 para. 2 (1992), where the Commission noted the benefits of the "nationwide availability of cellular service." In fact, in adopting the MTA/BTA boundaries for PCS and rejecting the use of MSAs/RSAs, the Commission cited the benefits wide service areas:

> The large transaction costs to aggregate MSAs and RSAs that have been incurred over the past ten years in the cellular industry have frequently been directed towards geographic aggregation to provide wider service area for consumers and to lower costs of providing service.

Memorandum Opinion and Order, PCS M O & O" 9 FCC Rcd. at 4987 para. 76.

technologically feasible. Thus, in order for a PCS carrier's subscribers to roam into other markets in cases where at least one PCS licensee in the other market does not utilize the same PCS standard, the subscribers could use dual-mode handsets that would permit the use of the cellular system in the other market (whether analog or incorporating the same digital standard). Such dual-mode PCS/analog cellular handsets are expected to be available in the very near future. Because the area of coverage is a critical, if not overriding, factor in the customer's selection of a carrier, a carrier's viability as a wireless competitor may depend upon its ability to integrate its PCS markets with its cellular markets. Should the Commission impose unrealistic obstacles on the aggregation of PCS and cellular markets by imposing an unrealistic overlap benchmark, carriers other than the largest CDMA-based providers may well be at a severe disadvantage in the marketplace. The Commission has concluded that "the public interest would be best served by maximizing the number of viable new entrants in a given market." *PCS M O & O*, 9 FCC Rcd. at 4999 para. 103 (emphasis added). Consumer welfare will hardly be promoted by the largest number of competitors theoretically possible in every market or portion thereof if each carrier does not provide a competitive choice.

This dovetailing of PCS and cellular markets is exactly Western's intention in the western United States. However, the PCS service areas, which are divided into 51 MTAs and 493 BTAs, are vastly different from the cellular map, which is divided into 306 MSAs and 428 RSAs. A patchwork of cellular and PCS markets to achieve blanket coverage in a particular territory thus necessarily involves some overlaps. The prohibition in the current rules against a single party's holding an attributable interest in a PCS market and cellular

market(s) where there is even a 10 percent population overlap could pose an insurmountable obstacle against achievement of seamless coverage made up of cellular and PCS markets.

The Commission has indicated that "[w]e are cognizant of problems created by overlaps between the PCS and cellular service areas, and provide some relief from these problems." *PCS M O & O*, 9 FCC Rcd. at 4988 para. 76. However, any "relief" in the current rules is insufficient. Current rules do allow a party controlling both a cellular and a PCS licensee where the overlap is 10 percent or greater to divest interests so as to come into compliance with spectrum caps, but only if the CGSA(s) covers 20 percent of less of the PCS service area population. Section 24.204(f) of the Rules, 47 C.F.R. § 24.204(f). Therefore, divestiture is not even an option in the case of larger overlaps, which may well occur absent any motives or opportunities for anticompetitive behavior. Furthermore, divestiture of a portion of a PCS market is not an easy option, because current rules limit partitioning of a PCS market only to rural telcos, and only then if the partitioned area bears some reasonable relationship to the telephone service area of the rural telco. There are no assurances that the rural telcos able to satisfy these criteria will have any interest in purchasing a portion of the PCS market. The only alternative may be to divest cellular holdings at the eleventh hour, presumably at firesale prices. In order to avoid "an exclusion [of cellular providers from PCS markets even though the degree of overlap was minimal]

[that] was neither fair nor desirable for maximizing competition," 9 FCC Rcd. at 5010 para. 133, the Commission must liberalize its cellular/PCS cross-ownership rules.[19]

In the second place, Section 24.203 of the Rules requires that licensees of 30 MHz blocks must provide service to at least one-third of the population in their licensed PCS area within five years of license grant and two-thirds of the population within ten years. For 10 MHz blocks, the requirement is that licensees must serve one-quarter of the population within five years of license grant, or make a showing of substantial service in their licensed area. Unlike the cellular service, there is no provision for licensing of any unserved areas to other parties. Thus, the Commission has explicitly countenanced in its rules the situation where a 30 MHz licensee fails to provide service to up to one-third of the population of its PCS market and in such portion of the market the spectrum lies fallow, but at the same time has concluded that an attributable investor in a cellular licensee whose CGSA includes a mere ten percent of the PCS service area population is unfit to hold a PCS licensee in that market. Even in the worst case, where the PCS licensee chose to delay or avoid altogether providing service within the area of its overlap and provide service only in the areas where there was no cellular overlap, it would still be well within the Commission's own requirements for building out its PCS market. This inconsistency could easily be eradicated by raising the threshold for a "significant overlap."

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[19]*See PCS M O & O*, 9 FCC Rcd at 5010-11 para. 134 for comments filed in response to the 10 percent overlap threshold and advocating a higher threshold. The Commission rejected these positions–one of which, namely CTIA's, included a market analysis based on the merger guidelines of the Department of Justice and the Federal Trade Commission to support its claim that a 40 percent overlap threshold would not result in anticompetitive conduct–without citing to any statistical data or even a general economic theory. *Id.* at 5011 para. 136.

In the third place, the proper focus of any restrictions against PCS eligibility should only be on a cellular carrier whose primary business within the targeted PCS market is cellular service to regions that would likely receive PCS service absent any anticompetitive motives. PCS cell sites operate at a higher frequency and lower power than cellular cites and, therefore, typically have a smaller coverage area. However, unlike in rural areas, wireless systems in urban areas require substantial frequency "reuse" to provide high capacity. The coverage advantage that cellular frequencies and analog technology enjoy in rural areas is not present in urban areas because analog cellular technology does not provide efficient frequency "reuse." As a result, the higher frequency, lower power, digital PCS systems are likely to provide greater capacity in urban areas. Thus, it is widely believed that PCS technology is better suited to urban areas than rural areas and may have cost advantages relative to cellular technology in urban areas. The expectation is that PCS licensees will find it far more profitable to build out the urban areas within their markets first, and will provide service to the rural areas only much later if at all.[20] Excluding a cellular carrier that provides cellular service to these fringe rural areas from obtaining a PCS license on the basis of any fear that it would not compete vigorously as a PCS carrier would serve no purpose--it could not be expected, and certainly is not required by the Commission's rules, that a party with no rural cellular interests in that PCS market would

[20]As discussed above, the rules for the build-out of even an MTA, which are based on population, not geographic area, would allow a PCS licensee to exclude many of the rural areas within its market from its long-term business plan.

itself serve these fringe areas.[21] Because the Sixth Circuit in *Cincinnati Bell* exhorted the Commission to examine less restrictive alternatives in promulgating any cellular/PCS cross ownership restrictions, the Commission must distinguish between cases where the cellular overlap involves areas (*i.e.*, urban area) that would likely be part of a vigorous PCS build out plan and those areas (*i.e.*, rural areas) that would not likely be part of such a PCS plan.

b. The Ownership Attribution Standard Should Be Raised from its Current Level of 20 Percent (or Actual Control) to 50 Percent (or Actual Control).

In adopting the 20 percent cellular attribution rule, the Commission asserts that it was attempting "to strike a balance between maximizing competition and allowing cellular entities to bring their expertise to PCS." *Bidding/Spectrum Cap NPRM* at 32 para. 72, citing *PCS M O & O*, 9 FCC Rcd. at 5003. However, even when it initially adopted this standard, the Commission seemed to acknowledge that its concerns about cellular operators' exerting undue market power would not be promoted by the 20 percent level:

> We recognize that this approach may restrict the opportunities of certain investors in cellular licenses to participate in PCS even if they have no meaningful involvement in the management of the cellular system and thus cannot influence its actions (e.g., "insulated" limited partners or non-voting shareholders with 20 percent or more interest). We believe, however, that to apply detailed attribution/insulation standards, such as our broadcast attribution rules, would unnecessarily complicate licensing procedures and delay introduction of service to the detriment of the public.

PCS Second R & O, 8 FCC Rcd. at 7746 para. 108 (cite omitted).

[21]Because of the acknowledged benefits of economies of scope, experience and existing infrastructure, exclusion of the cellular carrier on the basis of its rural interests in a particular market could work a particular disservice to the promotion of rapid PCS build-out and diverse and cost-efficient PCS offerings.